Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))	CC Docket No. 01-338

MOUNTAIN TELECOMMUNICATIONS, INC.

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SUMMARY

Mountain Telecommunications, Inc. (MTI) is a facilities-based competitive local exchange carrier which provides telecommunication service, including local service, in the State of Arizona. MTI is reliant on dedicated transport and high capacity loops, which it acquires from Qwest on an unbundled network element basis, to serve its customers. MTI uses unbundled transport to connect its collocation points on the Qwest network and uses high capacity loops to connect its customers' premises with the MTI network.

The court of appeals stated in USTA II that competitors need access to necessary inputs that "allow competition not only to survive but to flourish." Based upon that standard, there can be little doubt that MTI and other CLECs are "impaired" without access to ILEC dedicated transport on a UNE basis. No providers other than Qwest have available at any price dedicated transport facilities to connect each of the Qwest switches where MTI has collocation points. More importantly, ILEC special access service is not available to MTI at rates which allow competition to survive and flourish. A typical DS1 transport facility which costs MTI $48.21 when purchased as a UNE would cost $150 when purchased as special access; a DS3 transport facility which costs $425.70 as a UNE is priced at $837 in Qwest's interstate access tariff. The rate disparities between UNE prices and Qwest's intrastate tariffed rates are even more egregious.

Notwithstanding any expansive interpretations of the court of appeals decision in USTA II, the court did not vacate the Commission's impairment finding regarding high capacity loops. The Commission should reaffirm that finding CLECs like MTI have no feasible alternative to ILEC loops, and that CLECs are impaired without access to high capacity loops as UNEs. No other provider offers loops between MTI's network and the many locations of existing and

potential MTI customers. Neither is it economically viable or physically practicable for MTI to construct its own loops to the many locations of its current and future customers.

In order to ensure that the pro-competitive market-opening objectives of the 1996 Telecommunications Act are achieved, the Commission should promulgate rules which ensure the availability of ILEC dedicated transport and high capacity loops so long as there are not alternative sources of supply available (including ILEC special access) at prices which will allow competition to survive and to flourish.

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COMMENTS OF MOUNTAIN TELECOMMUNICATIONS, INC.

Mountain Telecommunications, Inc. (MTI), by its attorneys, hereby submits its comments in response to the Order and Notice of Proposed Rulemaking issued in this proceeding.[1]

INTRODUCTION

MTI is a telecommunications carrier headquartered at Tempe, Arizona. MTI provides telecommunications service, including local telecommunications service, throughout the State of Arizona. MTI is a facilities-based provider. Its facilities include two switches as well as its own fiber-based transmission network. However, MTI remains reliant on dedicated transport facilities provided by Qwest – the incumbent local exchange carrier for much of Arizona where MTI operates -- as unbundled network elements or "UNEs." In addition, to enable it to serve its customer base of small to medium-sized business users in Arizona, MTI also utilizes unbundled high capacity loops provisioned by Qwest as UNEs. Such loop facilities frequently are referred to as "enterprise loops." MTI does not purchase assembled combinations of UNEs. In short, MTI is not a UNE-P carrier.

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[1] Unbundled Access to Network Elements, *et al* (*Order and Notice of Proposed Rulemaking*), FCC 04-179, released August 20, 2004 ("Notice" or "NPRM").

Accordingly, MTI's interest in this rulemaking proceeding is focused on the continuing availability at cost-based prices of unbundled dedicated interoffice transport and unbundled high capacity loops, as required by Section 251(c)(3) of the Communications Act.[2] MTI has no feasible alternative sources of supply either for dedicated transport or for unbundled loops. Indeed, it is a gross understatement to state that MTI's ability to provide service to its customers is impaired without access to dedicated transport and unbundled loops from Qwest on a UNE basis.

MTI uses dedicated transport facilities provided by Qwest to connect its various collocation points throughout the Qwest network in Arizona. As contemplated by Section 251(c)(6) of the Act, MTI has collocations in many Qwest switch locations. Notwithstanding MTI's statutory right to collocate at Qwest switches,[3] that right is illusory if MTI is unable to transport its customers' traffic between those switch locations. No other provider in the state of Arizona is able to provide to MTI at any price adequate dedicated facilities to transport traffic between those Qwest switches where MTI has collocation points as well as between the Qwest switches and MTI customer locations. Indeed, without Qwest transport facilities, MTI would have no means to terminate traffic on its network originated by Qwest customers on the Qwest network. Neither would MTI be able to originate its customers' traffic and send that traffic to Qwest for termination on the Qwest network. In short, the statutory obligation to interconnect imposed on all telecommunications carriers by Section 251(a)(1) of the Communication Act would be rendered meaningless if CLECs are unable to acquire the necessary facilities, including transport facilities, to interconnect their networks with ILECs.

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[2] 47 U.S.C. § 251(c)(3).
[3] 47 U.S.C. § 251(c)(6).

While there may be limited situations where alternative transport facilities may be theoretically available between specific Qwest central offices, MTI has been unable to identify any providers of such alternative facilities willing to make them available to MTI. In addition, most central office pairs do not have available any alternative facilities. Those few carriers with significant fiber connections in Arizona have no capacity between Qwest collocation sites. For example, MTI believes that Cox Communications is the largest non-ILEC operator of fiber capacity in Arizona. Yet, Cox provides no such capacity at Qwest collocation sites. MTI is aware of only one non-Qwest vendor which offers any DS3 capacity transport facilities between Qwest central offices in Arizona. That one vendor has capacity connecting only a few of Qwest's switches. In those few locations where that vendor has available transport capacity, it offers that capacity to competing providers like MTI at "wholesale" rates which are higher than Qwest's retail rates. That vendor has no obligation to provide capacity to other carriers and has no financial incentive to do so.

The availability of high capacity loops to connect MTI's customers with its network is even more problematic. Loops, by definition, connect customer premises to a carrier's network. Very few of MTI's customers are located in buildings where any provider other than Qwest even has connectivity to the customers' premises. MTI's only alternative to Qwest loops is to self-provision loop capacity to thousands of buildings throughout Arizona in which existing and potential MTI customers might be located. Even in metropolitan Phoenix – a large metropolitan area, but not a dense area – not more than several hundred buildings are located near MTI's network.

In considering adoption of rules to implement the unbundled network element requirements of Section 251, including specifically, the "impairment" standard of Section

251(d)(2), the Commission should remain mindful of the fact that there are pronounced differences in the telecommunications infrastructures throughout the United States. Irrespective of whether suitable alternative sources of dedicated transport or high capacity loops may exist in New York, Chicago, or Washington, DC, the circumstances which exist in other areas, especially, low density rural areas, like those which exist throughout much of Qwest's operating territory are quite different. Even in Phoenix, a major market, there are few concentrated areas, few large, high-rise buildings, and long distances between Qwest serving wire centers. These conditions render it virtually impracticable for competing carriers such as MTI either to self-provision to the many locations needed to provide service to customers or to acquire transport capacity or high capacity loops from sources other than Qwest. In short, MTI has no available alternative providers of dedicated transport or high capacity loops in Arizona.[4]

I. ILEC TARIFFED SPECIAL ACCESS SERVICE DOES NOT OBVIATE THE NEED FOR DEDICATED TRANSPORT PROVIDED AS A UNE BASED ON THE SECTION 251(d)(2) IMPAIRMENT STANDARD

In United States Telecom Association v. FCC, 359 F.3d 554 (D.C. Cir. 2004), *pets. for cert. pending* ("USTA II"), the Court of Appeals admonished the Commission for its refusal to consider the availability of incumbent local exchange carrier (ILEC) tariffed special access service in reaching its national impairment determination for dedicated transport. The court stated that "[w]here competitors have access to necessary inputs that allow competition not only

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[4] On September 29, 2004, XO Communications, Inc. filed with the Commission an Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers are Impaired without DS1 UNE Loops. MTI supports the relief sought by XO in that petition. The XO petition contains a detailed and accurate description on a national level of the unavailability to CLECs of high capacity loops. XO's description of the situation regarding unbundled high capacity loops on a national basis is consistent with MTI's experience in Arizona. In short, alternative sources of supply are non-existent; replacement of unbundled loops at TELRIC-based prices with special access is uneconomic and would virtually eliminate MTI's ability to offer competitive services with those of the incumbent; and self-provisioning of loops, even to the largest customers, is economically prohibitive.

to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling."[5] Based upon MTI's experience, ILEC special access is often not available to it as an alternative to unbundled dedicated transport. Moreover, where it is available, it certainly is not available at rates which permit competition to survive, let alone to flourish.

MTI purchases from Qwest – the ILEC throughout much of the State of Arizona where MTI operates – unbundled dedicated transport to connect its collocation points at different Qwest central offices. So far as MTI has been able to determine, no functionally equivalent service (dedicated transport between Qwest central offices) is available at any price in Qwest's Tariff FCC No. 1- its interstate access service tariff. Thus, notwithstanding the existence of Qwest's tariffed special access service, interstate special access is not available to MTI at any price to connect its collocation points within the Qwest network in Arizona for MTI's provision of local service in competition with Qwest.

Even where Qwest's interstate special access might be nominally available to MTI, by no means is it available at rates that allow competition to survive and to flourish. For example, DS1 dedicated transport facilities provisioned by Qwest as UNEs and used by MTI are priced at \$35.00 plus \$0.94 per mile per month. The median distance of MTI's DS1 dedicated transport facilities is 13 miles. Qwest's TELRIC-based UNE price for that 13 mile DS1 transport facility in Arizona is \$48.21 per month. If MTI were to purchase the identical 13 mile DS1 dedicated transport facility as special access pursuant to Qwest Tariff FCC No. 1 (based on a 60 month contract), the monthly recurring price would be \$52.50 plus \$7.50 per mile for a total price of \$150 – more than 300 percent higher than the TELRIC price for the identical service when

[5] 359 F.3d at 576.

priced as a UNE. For DS3 transport facilities, the price differences between UNE rates and special access rates also are dramatic. A 13 mile DS3 circuit purchased as a UNE pursuant to Qwest's Statement of Generally Available Terms for Arizona is priced as follows: $246 plus $15.90 per mile, for a total monthly price of $425.70. The identical 13 mile DS3 circuit purchased pursuant as special access pursuant to Qwest's Tariff FCC No. 1 would be priced at $330 plus $39 per mile – a total monthly price of $837. The DS3 special access rate is nearly two hundred percent higher than the TELRIC-based UNE rate for the same facility.

These stark rate comparisons lead to the inevitable question: whether price increases of 200 to 300 percent for dedicated transport will enable competition to survive and flourish? Based on the economic realities which currently exist in the competitive local telecommunications market, the answer to that that question is no. It is widely recognized and acknowledged that competitive telecommunications providers, even in the best current circumstances, are subject to razor thin margins. In an industry where net profits often are minuscule to non-existent, a tripling of costs for network elements paid to ILECs would eliminate any opportunity for profitable operation, irrespective how efficiently those carriers operate.

Payment to Qwest for network elements, including dedicated transport, is MTI's single largest expense. A doubling to tripling of MTI's costs for transport would eliminate virtually the entirety of its gross margins and would preclude any opportunity for profitable operation.

As if the aforementioned 300 percent price increase is not alone a substantial restraint on local competition, that increase represents the beginning, not the end, of the UNE-special access pricing disparity. As the Commission is well-aware, special access pricing has been virtually deregulated by the Commission.[6] In the years following that deregulatory ruling, special access prices and return levels enjoyed by Qwest and other ILECs on their provision of interstate special access services have risen dramatically.[7] The Special Access Reform Coalition letter referenced in footnote 6 of these comments was precipitated by an August 16, 2004 Qwest tariff filing (Transmittal No. 206) which contains across-the-board special access rate increases averaging 26 percent – the third major Qwest special access rate increase in less than two years. Whatever the wisdom of that deregulatory undertaking may have been for the pricing of interstate special access as an interstate access service, it cannot seriously be disputed that such rapid and unrestrained escalation of special access pricing is not conducive to rates which allow local competition to survive and flourish, as required by the court of appeals in USTA II.

Implicit in the court's holding that the Commission must consider the availability of ILEC tariffed interstate special access service is the assumption that such services may lawfully be provisioned out of an interstate tariff for wholly intrastate purposes. MTI and other local competitors procure ILEC dedicated transport for the express purpose of providing local telecommunications service. By definition, local telecommunications service is classified as intrastate service.[8] MTI is aware of the Commission's "10 percent rule" which provides that any facility whose use is ten percent or more interstate service is classified as interstate.[9] However, most unbundled dedicated transport facilities obtained by MTI are used primarily, if not entirely, for local (intrastate) service, and therefore are not subject to the Commission's 10 percent rule.

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[6] Access Charge Reform, *et al*, 14 FCC Rcd 14,421 (1999), *aff'd. sub nom.* WorldCom, Inc. *et al* v. FCC, 238 F. 3d 499 (D.C. Cir. 2001).
[7] See, *e.g.*, letter from Brian R. Moir, Chairman, Special Access Reform Coalition, to Michael K. Powell, Chairman, Federal Communications Commission, dated September 2, 2004, filed in RM No. 10593 (In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services).
[8] 47 U.S.C. §§ 152(b), 221(b).
[9] 47 C.F.R. § 36.154(a).

Thus, Qwest may not lawfully provision interstate service pursuant to an interstate access tariff on file with the Commission for the purpose of providing MTI with intrastate facilities which will be used for local service.

MTI recognizes that Qwest offers tariffed DS1 and DS3 transport service on an intrastate basis pursuant to a tariff on file with the Arizona Corporation Commission (ACC). Although MTI may be legally entitled to purchase such facilities on an intrastate basis from the ACC tariff, Qwest's intrastate DS1 and DS3 rates are even higher (and therefore even less conducive to allowing competition to survive and flourish) than are Qwest's interstate special access tariff rates. That same 13 mile DS1 facility referred to above, when procured pursuant to Qwest's intrastate tariff (if it were available, which it is not) would cost $395 per month (more than an eight hundred percent increase above the current TELRIC-based UNE rate); a 13 mile DS3 transport facility purchased from Qwest's intrastate tariff, if it were available, would be priced at $1,050.70 per month (more than a two hundred percent of the UNE rate for the same facility) – rates far above even Qwest's interstate special access rates and which are even less conducive to allowing local competition to survive and flourish.

In establishing unbundling rules which will withstand judicial review in the wake of USTA II, the Commission must focus on what the court held as well as what the court did not hold. The court did not conclude that the availability of ILEC special access at tariffed rates eliminates the need for dedicated transport provided on a UNE basis, nor did the court conclude that the availability of ILEC special access *per se* precludes a finding of impairment without the availability of unbundled transport. The court required only that "the Commission's impairment analysis must consider the availability of tariffed ILEC special access service in determining whether would-be entrants are impaired . . . ."[10]

The consideration of the availability of ILEC tariffed special access required by the court must include as a component a determination of whether or not ILEC tariffed special access provides competitors, including MTI, with access to necessary inputs at rates that allow competition not only to survive but to flourish.[11] Rates which result in immediate 200 to 800 percent increases in the price of those necessary inputs and which may continue to escalate in a virtually unregulated environment (as demonstrated by Qwest's three special price increases in less than two years) do not meet the test established by the court.

Accordingly, a fair reading of the USTA II court's analysis of dedicated transport not only permits the Commission to determine that competitors are impaired without unbundled access to dedicated transport facilities, notwithstanding the availability of ILEC special access, but that the court's requirement that special access prices must allow competition to survive and flourish actually compels a determination that competitors are materially impaired without access to unbundled dedicated transport.

II. THE COMMISSION MUST APPLY THE SECTION 251(d)(2) IMPAIRMENT STANDARD BASED ON THE STATED GOALS AND POLICIES OF THE TELECOMMUNICATIONS ACT OF 1996

In establishing criteria for determining whether competing carriers' ability to provide telecommunications services would be impaired by the unavailability of network elements provided on an unbundled basis at cost-based rates, the Commission is bound to remain mindful of the purposes which Congress sought to achieve by enactment of the Telecommunications Act of 1996. It also must focus on the local telecommunications markets as they currently exist and

[10] 359 F.3d at 577 (emphasis added).
[11] 359 F.3d at 576.

the relative positions, including first mover advantages, held by ILECs and their competitors in those markets.

Nowhere is the statutory purpose for the 1996 Act, including the all-important Sections 251 and 252, more directly and articulately stated than in the preamble to the 1996 Act:

> AN ACT To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new technologies.[12]

The 1996 Act is, first and foremost, about promoting competition – not just competition for competition's sake, but rather, promoting competition to ensure lower prices and higher quality services for consumers. During the prolonged debate surrounding implementation of the "necessary" and "impair" standards Section 252(d) to govern the availability of unbundled network elements much has been said and written about so-called "intermodal" competition. MTI does not dispute that wireless networks and fiber-based cable television networks have emerged as alternative suppliers of certain services offered by ILECs. No doubt, Congress was aware of these technologies at the time of enactment of the 1996 Act. However, with full knowledge of the opportunities for such intermodal competition, Congress directly and specifically enacted a law which contemplates three alternative means for entering local markets in competition with Qwest and other ILECs. Those include facilities-based competition (*i.e.*, construction and operation of alternative networks which would interconnect with those of ILECs);[13] resale of ILEC services obtained by competitors from ILECs at wholesale rates;[14] and unbundled network elements obtained from ILECs at cost-based prices.[15]

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[12] Telecommunications Act of 1996, Pub L. 104-104, 110 Stat. 56 (1996).
[13] 47 U.S.C. § 251(c)(2).
[14] 47 U.S.C. § 251(c)(4).
[15] 47 U.S.C. § 251(c)(3).

Had Congress intended to enact a law which provided opportunities only for intermodal competition, it could have done so. Instead, it wisely recognized that many new entrants, including facilities-based entrants, would require access to ILEC networks in order to offer services in competition with those provided by ILECs. Moreover, Congress clearly understood that in order to provide service in competition with ILECs, access to ILEC networks, when required, must be available at prices which would make competition with those same ILECs economically viable.

MTI does not seek access to Qwest transport for the abstract purpose of having access to the Qwest network. MTI needs access to Qwest dedicated transport to make it economically possible for MTI to offer local telecommunications service in competition with that of Qwest. When Qwest uses its own network facilities to transport traffic between its switches throughout the Qwest network, it does not pay to itself either interstate or intrastate tariffed special access prices for the use of those facilities. If, however, MTI must pay to Qwest tariffed special access rates to transport its customers' traffic through that same Qwest network, its costs of providing service will be substantially higher than Qwest's costs, even if all other aspects of MTI's cost structure are more efficient than that of Qwest. Neither should it be disregarded by the Commission that the Qwest network, including those transport facilities, was built by Qwest using regulated rate payer-funded monies over the many years that it and its predecessors operated as a statutory and government-protected monopoly.

III. THE COMMISSION SHOULD REAFFIRM ITS PRIOR DETERMINATION THAT CLECs ARE IMPAIRED WITHOUT ACCESS TO ILEC ENTERPRISE LOOPS

One important Commission conclusion which was not disturbed by the court of appeals decision in USTA II was the Commission's finding of impairment with respect to high capacity or enterprise loops. As a provider of local telecommunications service to small to medium-sized business users throughout Arizona, MTI has relied on unbundled high capacity loops to connect its customers with the MTI network. MTI shares the concern articulated recently by XO Communications in its emergency petition (see note 4 of these comments) that several ILECs have taken an expansive and erroneous view of the scope of USTA II and have "bootstrapped" the court's vacation of the Commission's national impairment finding for dedicated transport to encompass high capacity loops as well, notwithstanding the fact that loops have always been treated by the Commission as separate network elements and despite the fact that no reasonable reading of USTA II supports such an expansive interpretation.

Irrespective of how certain ILECs may attempt to read the court of appeals decision, the Commission should be aware that MTI is entirely reliant on high capacity loops provisioned as UNEs. There are no alternative providers of such loops. Neither is it practicable for MTI to self-provision loops to its customers' premises. In addition to being economically prohibitive, the self-provisioning process would necessitate access to building rooftops and private rights-of-way throughout the State of Arizona, not to mention the need to obtain consents from the numerous local governmental bodies where existing and future MTI customers may be located. For these reasons, as well as those set forth in considerable detail in XO Communications' emergency petition, the Commission should reiterate and clarify its prior determination that CLECs are impaired without access to unbundled high capacity loops at TELRIC prices.

CONCLUSION

For all of the reasons stated herein, it is clear that MTI's ability to provide local telecommunications service is impaired without access to Qwest unbundled dedicated transport and high capacity loops at cost-based rates. More importantly, a careful and thorough reading of the court's decision in USTA II supports the notion that competing carriers are impaired unless they have available to them sources of dedicated transport (including tariffed services of the ILECs) provided at rates which make it possible for competition to survive and to flourish. Accordingly, MTI respectfully urges the Commission to promulgate rules which ensure the continued availability on an unbundled network element basis dedicated interoffice transport and high capacity loops.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michelle D. Diedrick, an Executive Assistant with the law firm of Greenberg Traurig, LLP, hereby certify that on October 4, 2004, a true and correct copy of the foregoing was filed via electronic mail to the **FCC's Electronic Comment File Submission** with the following:

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